

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 07/29/13;
Decision Issued: 07/30/13; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10117; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10117

Hearing Date: July 29, 2013

Decision Issued: July 30, 2013

PROCEDURAL HISTORY

On February 25, 2013, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On April 2, 2013, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 24, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 29, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Veterans Services employs Grievant as a Registered Nurse II. She has been employed by the Agency for approximately 16 months. One of Grievant's duties was to perform skin checks of residents newly admitted to the Facility. She received training regarding how to perform skin checks properly.

When new residents are admitted to the Facility, the admitting staff examine the patient's skin from head to toe to determine whether the patient has any sores or other skin problems that may not be obvious in appearance. The 11 p.m. to 7 a.m. Night Supervisor is responsible for performing a second skin check on each newly admitted patient to ensure that the admitting staff did not overlook any problem with the patient's skin.

On February 8, 2013, the Resident was admitted to the Facility from a hospital. He had a stage 4 pressure wound to his sacral area. The wound was one centimeter long and .2 centimeters wide. The Agency considers a stage 4 pressure wound to be very serious because it could result in infection throughout the patient's body if untreated. The Agency considers failing to detect a stage 4 pressure wound to be a significant oversight because the Facility is regularly audited and an audit finding that it had failed to properly detect such a wound could result in penalties to the Agency.

When the Resident was admitted to the Facility, the admitting staff performed a skin check but failed to observe the Resident's stage 4 wound.

Grievant worked as the 11 p.m. to 7 a.m. Night Supervisor on February 8, 2013. She examined the Resident from head to toe but failed to separate the sacral area to

observe the Resident's skin on that part of his body. Had she done so, she would have been able to identify the wound and begin treatment. Grievant failed to identify the Resident's stage 4 pressure wound.

On February 11, 2013, an employee discovered the stage 4 wound and initiated treatment of the wound. Following treatment, the stage 4 wound became a stage 3 wound by February 22, 2013 when the Doctor examined the Resident.

The Agency identified five employees including Grievant who had been in contact with the Resident and failed to identify the wound. Each of those employees received a Group I Written Notice.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense.² In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On February 8, 2013, Grievant was responsible for checking the skin of a newly admitted Resident to verify that the admitting staff had not overlooked a skin problem. She examined the Resident but failed to fully examine the Resident to enable her to identify a stage 4 pressure wound on his body. Grievant's work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the wound was very small and difficult to detect such that five nursing professionals failed to identify the wound. Although the wound was small, the evidence showed that Grievant had been provided with sufficient training to identify the wound. She was responsible for verifying that the admitting staff had not overlooked a skin problem with the newly admitted Resident, yet she failed to do so.

Grievant argued that the Agency failed to apply progressive disciplinary action. Grievant had no prior discipline or counseling relating to her nursing care and, thus, Grievant argued that she should have received counseling instead of a Written Notice in

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

this case. The Standards of Conduct encourages agencies to engage in progressive discipline, but agencies are not required to do so as a precondition to the taking of disciplinary action.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the Agency failed to discipline all of the employees who overlooked the Resident’s stage 4 wound. The Agency presented evidence showing that it had identified five employees responsible for checking the Resident’s skin who failed to identify the wound. The Agency issued Group I Written Notices to all of those employees. The Agency did not inconsistently discipline its employees.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director

³ *Va. Code § 2.2-3005.*

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.